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No. 00-198

IN THE
Supreme Court of the United States

STATE OF LOUISIANA,

Petitioner,

v.

ANWAR HADDAD,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE LOUISIANA SUPREME COURT

BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

On April 29, 1997 at approximately 12:30 p.m., Deputy Brady Buckley of the Jefferson Parish Sheriff's Office observed a vehicle driven by Lionel Smith violate certain traffic ordinances causing Buckley to stop the vehicle. A passenger in that vehicle was the defendant, Anwar Haddad. The vehicle was owned by a third party.

Buckley ordered the driver to exit the vehicle which Smith did. When asked to identify himself, Smith claimed to be "Mark Smith." Buckley asked for vehicle registration papers and proceeded with Lionel Smith back to the vehicle to retrieve those documents.

The foregoing facts are generally conceded by all parties herein. It is at this point, however, that the factual accounts begin to differ.

Buckley claims that as he approached the vehicle, he noticed the passenger, Anwar Haddad, retrieve a Lorcin .38 caliber weapon from his waistband and drop the weapon on the floorboard of the car.

Haddad claims that he was unaware that any weapon was in the vehicle at the time of the traffic stop and that Smith, upon being ordered to exit the vehicle by the deputy, tossed the weapon to Haddad before exiting. Haddad then dropped the weapon to the floorboard where it was later spotted by Buckley.

Buckley, at trial, related an elaborate story about having drawn his weapon in self defense when he first spotted Mr. Haddad allegedly removing the weapon from his waistband and of, at gunpoint, ordering Haddad to place his hands on the interior ceiling of the vehicle while, using Lionel

Smith as a human shield, he returned Smith to the rear of his police car and secured Smith with handcuffs which Buckley double locked. Buckley then proceeded to the passenger side of the vehicle where he ordered Haddad to exit the vehicle, lie face down on the ground, and then handcuffed Haddad.

Haddad claimed that Buckley never pulled his weapon, never ordered Haddad to place his hands on the interior ceiling of the vehicle and did not realize that there was a weapon on the floorboard of the vehicle until Haddad pointed the weapon out to him.

Buckley's police report contains no mention at all of his drawing his weapon, ordering Haddad to place his hand's on the ceiling of the vehicle, or using Lionel Smith as a shield.

There were only three witnesses to the incident in question, Anwar Haddad, Deputy Brady Buckley and Lionel Smith.

The first trial on the merits resulted in a hung jury. Anwar Haddad was retried before a jury on June 24, 1998. At each trial the defense sought, and the trial judge granted, a writ of habeas corpus ad testificandum to have Lionel Smith brought from the Orleans Parish Prison, where he was incarcerated on unrelated charges, to testify as a witness at trial.

Prior to the selection of a jury, Judge Jo Ellen Grant permitted questioning of Lionel Smith, out of the presence of the jury panel, to determine whether he would invoke his Fifth Amendment privilege against self-incrimination and refuse to testify despite his being summoned by Haddad

as a witness. Smith, as he had done at the time of the first trial, chose to invoke his Fifth Amendment right against self-incrimination and not to testify. Unlike the first trial, however, Judge Grant refused to permit Smith to be called as a witness in the presence of the jury.

Despite the urging of defense counsel on numerous occasions, the trial judge failed to give any instruction to the jury regarding the failure of Smith to appear as a witness at trial.

Haddad was convicted of being a felon in possession of a firearm and was sentenced to ten years imprisonment without the benefit of probation, parole or suspension of his sentence.

Haddad's conviction was affirmed by the Court of Appeal, Fifth Circuit, of the State of Louisiana by ruling dated March 30, 1999.

The Louisiana Supreme Court reversed the conviction ordering a new trial, and subsequently denied the request for a rehearing filed by the State of Louisiana.

ARGUMENT

Prior to trial defendant, Anwar Haddad, filed a motion for issuance of a writ of habeas corpus ad testificandum seeking to have Lionel Smith produced in court to testify as a witness at trial.

Smith was the driver of the vehicle in which Haddad was a passenger at the time of his arrest. The vehicle Smith was driving was owned by a third party and it was Haddad's

contention that the weapon, which the state was accusing him of possessing was actually, in the possession of Lionel Smith. When Smith was stopped by a Jefferson Parish Deputy for traffic offenses, Smith exited the vehicle and threw the weapon to Haddad, who then placed the weapon on the floorboard of the car, where it was discovered by the deputy.

Prior to the selection of a jury, Judge Jo Ellen Grant permitted questioning of Lionel Smith, out of the presence of the jury panel, to determine whether he would invoke his Fifth Amendment privilege against self-incrimination and refuse to testify despite his being summoned by Haddad as a witness.

Smith, who was advised by court appointed counsel, declared that he chose not to testify but rather to invoke his Fifth Amendment privilege as to any questions relating to the incident for which Haddad was charged. This claim by Smith was in keeping with his prior appearance at the earlier trial of Haddad on the same charge, a trial which resulted in a hung jury. At that earlier trial Smith also invoked his Fifth Amendment privilege on the witness stand in the presence of the jury as to any questions regarding the subject incident.

The trial judge then proceeded with selection of the jury, opening statements and trial of the case.

Both Louisiana and federal jurisprudence endorse the actions of Judge Grant in questioning the witness, Smith, out of the presence of the jury and in refusing to permit him to be called as a witness during trial merely for the purpose of having him assert his right against self-incrimination before the jury.[1]

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1. *State v. Gerard*, 96-366 (La. App., 5th Cir., 11/14/96) 685 So. 2d 253, 258; *State v. Berry*, 324 So2d 822, 830 (La., 1975), (Cont'd)

Defendant, Haddad, claimed in his appeal, however, that it was reversible error for the judge, under the specific facts and circumstances of this case, not to give a neutralizing jury instruction regarding the failure of Lionel Smith to testify at trial.

This issue was visited in *United States v. Martin*[2], where a trial judge refused to allow the defense to put an informant on the stand and compel him to invoke his privilege against self-incrimination in the presence of the jury, but later gave the jury the following "neutralizing" instruction:

> There has been testimony in this case about an informant named Samuel Hudson. As a result of a hearing held outside of the presence of the jury, the Court has determined that Mr. Hudson is not available to be called as a witness by either side in this case.
>
> The jury may not draw any inference from the fact that Samuel Hudson did not appear as a witness in this case.

In upholding the trial judge's decision and the defendant's resulting conviction, the Court stated:

> In such circumstance it was well within the discretion of the trial court to refuse to allow the

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(Cont'd)

cert. denied, 425 U.S. 954, 96 S. Ct. 1731, 48 L. Ed. 2d 198 (1976); *State v. Edwards*, 419 So. 2d 881 (La., 1982); *United States v. Lacouture*, 495 F.2d 1237 (C.A. 5th, 1974); *United States v. Griffin*, 66 F.3d 68 (C.A. 5th, 1995); *Namet v. United States*, 373 U.S. 179, 83 S. Ct. 1151, 10 L. Ed. 2d 278 (1963).

2. *United States v. Martin*, 526 F.2d 485 (C.A. 10th, 1975).

> informant to be called to the witness stand and be compelled to thereafter invoke his Fifth Amendment right in the presence of the jury, thereby permitting the jury to draw inferences, whatever they might be, from the mere fact that the witness chose to assert a right given him by the Constitution. **And the neutralizing instruction given the jury was proper and served to put the entire matter in context.**" (Emphasis added).[3]

In the prior case of *Bowles v. United States*[4], the Court recognized the importance of such a neutralizing instruction in a similar circumstance where a trial judge refused to allow a witness to testify in the presence of the jury knowing the witness would invoke his privilege against self incrimination, holding:

> . . . the trial judge could properly have given a neutralizing instruction, one calculated to reduce the danger that the jury will in fact draw an inference from the absence of such a witness . . . Had either counsel requested the court to instruct the jury that they should draw no inference from Smith's absence because he was not available to either side, it would have been error to refuse this instruction.[5]

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3. *Id.*, at page 487.

4. *Bowles v. United States*, 439 F.2d 536 (D.C. en banc, 1970).

5. *Id.*, at page 542.

The appellate court in *Bowles* refused to grant the defendant a new trial. However, Judge J. Skelly Wright, in a dissent, expressed his strong opinion for the necessity of a neutralizing instruction in these circumstances, writing:

> . . . appellant is entitled to a new trial. Appellant produced Raymond Smith as a witness. Before allowing Smith to testify before the jury, the trial court determined that Smith would assert his rights under the Fifth Amendment if questioned about the killing. Whereupon the court refused to allow him to be produced before the jury and instructed counsel not to refer to the matter in their closing arguments to the jury. No instruction on the subject was given the jury by the court. Thus the jury was permitted to draw the inference that appellant's defense was framed — otherwise he would have produced Smith.
>
> Pretermitting the question whether the appellant had a right to place Smith on the witness stand before the jury, at the very least appellant was entitled to an instruction which would neutralize any inference arising from the failure to produce him. The majority admits as much and says that in the future such an instruction should be given. In the meantime appellant has a life sentence to serve. I cannot help but believe that if such an instruction had been given in this admittedly borderline case, the jury, or at least one juror, might have been unable to conclude beyond a reasonable doubt that appellant was guilty of first degree murder.[6]

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6. *Id.*, at pages 546-547.

The United States Court of Appeals, Fifth Circuit has twice subsequently sidestepped the merits of this issue but, in each instance, gave a clear indication that it would give consideration to the issue should the proper set of circumstances present itself as, it is urged, exist in the instant case.

In *United States v. Lacouture*, the Court commented in a similar circumstance, "As for the complaint of the court's failure to give a neutralizing instruction, none was requested . . . and the Court may well have felt that the failure to request such an instruction represented a tactical choice by the defense with which it should not tamper."[7]

In *United States v. Sirovich*[8], the Court was presented with a situation wherein the defense did request a neutralizing charge to the jury at trial and was rebuffed by the trial judge. The appellate court sidestepped the issue thusly:

> Appellants now confront us with the proposition that while it would have been improper for the prosecution or the defense to call attention to the failure of the co-defendants to take the witness stand the trial judge should have done so by giving the requested instruction.
>
> In *Bowles v. United States*, 1970, 142 U.S. App. D.C.26, 439 F.2d 536, 542, where no such instruction was requested, the Court remarked that if it had been requested the instruction should have been given (dictum).

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7. *Supra*, at page 1241. *See also United States v. Kerr*, 711 F.2d 149 (C.A. 10th, 1983) wherein the Tenth Circuit reached a similar conclusion when "there was no direct request for an admonition or instruction as to the unavailability or absence of the 'witness.' " At page 152.

8. *United States v. Sirovich*, 555 F.2d 1301 (C.A. 5th, 1977).

> Here, we find it unnecessary to indulge in dictum. There is nothing in this record to show that the co-defendants were subpoenaed as witnesses, thereafter given an opportunity in chambers to claim the privilege, and did, in fact, claim it.
>
> That being so, we leave the point for decision at a later day, if it should arise. We observe merely that the Court was under no duty to charge the jury about something which had not happened.[9]

The issue was raised, but similarly avoided, by a Louisiana appellate court in *State v. Gerard* [10], *supra*, but, while the defendant complained that the trial judge erred by failing to instruct the jury on the relevance of a co-defendant's invocation of his Fifth Amendment privilege against self-incrimination, his defense counsel failed to address this issue in her actual argument and, therefore, that assignment of error was deemed to have been abandoned on appeal.

Following the trial judge's ruling that Anwar Haddad would not be permitted to call Lionel Smith at the trial on the merits, defense counsel entered an objection on the record expressing the prejudice such a ruling would cause to the defendant.[11]

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9. *Id.*, at pages 1302-1303.

10. *Supra*, at page 892.

11. Appendix - 1a - A.

Counsel specifically detailed his expectation that the defendant's failure to call Lionel Smith as a defense witness, particularly given the fact that Lionel Smith is described as the defendant's friend, would create an negative inference in the mind of the jurors.

Later in the trial the defendant's brother, Samir Haddad, the owner of the gun in question, in his testimony related how the gun in question came to be present in the car in which Anwar Haddad was arrested. Samir Haddad admitted that he had taken the gun into the car the night before when he was out with friends and that, at the end of the night, had left the gun under one of the seats of the car. The district attorney, in his cross examination of the witness, specifically made reference to Lionel Smith, and questioned his failure, among others, to be called as a witness at trial.[12]

Immediately upon the district attorney commenting in his cross-examination about the fact that people who were with Samir Haddad on the night prior to the arrest, including Lionel Smith, would not be present to testify, defense counsel requested a bench conference for the purpose of again lodging an objection regarding prejudice to the defendant.[13]

When the defendant took the stand, he related to the jury the explanation of his defense which was that Lionel Smith had the weapon in his possession at the time the vehicle was stopped and that, when Smith exited the vehicle at the order of the Jefferson Parish Deputy, Smith tossed the gun to Haddad in an attempt to conceal the weapon.

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12. Appendix - 1a - B.

13. Appendix - 3a - C.

At the end of the trial testimony and just prior to closing arguments, defense counsel again requested that the court include a jury charge which would would have some neutralizing effect upon the prejudice caused by the natural inference which would exist in the jury's mind as to why Lionel Smith had not been called to the witness stand.[14] This request was denied.

In closing argument, the district attorney once again referred to Lionel Smith, saying Lionel Smith had no reason to toss the gun to Anwar Haddad at the time of the traffic stop because Lionel Smith has no reason to fear having possession of the gun in question. And then, the district attorney asked the jury to ponder a question only Lionel Smith could answer[15] raising again the natural inference for the jury to question in their own minds why Lionel Smith had not testified on behalf of his friend and answered this question. The numerous references of the district attorney, whether deliberately calculated or unintentional, could not help but instill in the jury's mind questions about Smith's failure to testify.

If Lionel Smith were a friend of the defendant's and if he could corroborated the defendant's alibi, would he not have testified on his Haddad's behalf when Haddad was facing a charge which would result in a minimum jail sentence of ten years?

If Lionel Smith, as the district attorney argued, was not subject to being booked for possession of the weapon because he was not a convicted felon, would he not testify at trial to his possession of the weapon and corroborate the defendant's defense to the charge, if that defense had any merit?

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14. Appendix - 5a - D.

15. Appendix - 6a - E.

Why did Lionel Smith toss the gun to the defendant, as Haddad claimed?

The significance of the testimony of Lionel Smith is paramount in this case as he is one of only three eyewitnesses to the incident forming the basis of the charge against the defendant, Anwar Haddad, and, as such, was the only person who could corroborate either version of events presented to the jury. Smith was called as a witness by the defendant specifically for the purpose of corroborating defendant's version of the incident and, thereby, establishing a defense to the pending charge due to defendant's lack of intent.

The petitioner herein portends to this Court draconian consequences if the ruling of the Louisiana Supreme Court is not reversed, claiming that the ruling "presents a huge new confounder in state and federal criminal cases" and "undermines the certainty of the verdict."[16]

However, a review of the ruling of the Louisiana Supreme Court clearly demonstrates that the Court's decision was based not only on the facts presented in this specific case, but also as a result of the Court's concern that comments made by the prosecuting attorney at trial, in the absence of a neutralizing charge, had a prejudicial effect on the defendant's right to a fair trial.

It is also important to note that this case was factually void of any evidence which may have served to corroborate the charge of possession against the defendant and which may have served to render the lack of a neutralizing charge merely harmless error. For example, the defendant did not own the

16. Petition for Writ of Certiorari, at page 9.

gun in question, did not own the car in which the gun was found, was not in control of the car in which the gun was found, nor did he possess keys to the car.

Similarly, this Court must keep in mind that had Lionel Smith been a witness favorable to the State, and had he chosen to invoke his Fifth Amendment privilege rather than testify, the State, if it deems Smith's testimony to be significant, may through plea bargaining or a grant of immunity, remove that impediment thus compelling Smith to testify.

The defendant, on the other hand, has no such power and, therefore, the issue of the availability of Smith as a trial witness rests solely within the discretion of the prosecutors.

CONCLUSION

The federal courts have long countenanced the use of a neutralizing instruction in appropriate circumstances.

The Louisiana Supreme Court, drawing upon those federal cases, granted to Anwar Haddad a new trial in a ruling, the scope of which is extremely narrow and very fact specific to this particular case.

This ruling neither presents an unwarranted extension of constitutional law nor does it conflict with the decisions of federal circuit courts or that of other states as the petitioner asserts.

The following jury instruction would have served to countermand the inferences created by the prosecutor's references to Lionel Smith's failure to testify at trial and would have preserved this defendant's right to a fair trial:

> It has been determined that Lionel Smith is unavailable to testify as a witness at trial today. You are instructed that you are not to draw any inference, either for or against the state or the defendant, as a result of his failure to testify.

Respectfully submitted,

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